No. 10024

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

B. R. Morris, doing business as L. Rifkin & Sons,

Appellant,

vs.

The Franklin Fire Insurance Company of Philadelphia, Pennsylvania, a corporation,

Appellee.

APPELLEE'S BRIEF.

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Jurisdiction.

As stated by appellant, the entire issue involved in this appeal deals with the question of jurisdiction.

The appeal is taken from a judgment of dismissal of the action granted by the District Court and from an order of the District Court denying the motion of the plaintiff to vacate said order of dismissal.

In order for the District Court to have had jurisdiction all of the plaintiffs and all of the defendants must have been residents of different states in order to constitute a diversity of citizenship.

U. S. Code, Annotated, Title 28, Section 41, Subdivision 1;

Wylie v. State Board of Equalization of California (D. C. Cal., 1938), 21 Fed. Sup. 604;

Osthaus v. Button (C. C. A. Pa., 1934), 70 Fed. (2d) 392.

Moreover, should it have been feasible to have re-aligned the parties so as to have made all defendants, except Franklin Fire Insurance Company of Philadelphia, Pennsylvania, plaintiffs instead of defendants, each of said plaintiff's claim must have exceeded the jurisdictional amount of $3000.00.

U. S. Code, Annotated, Title 28, Paragraph 127.

The record indisputably establishes that the defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, had the same citizenship as the plaintiff and hence there was no diversity. Also the record fails to show that were such defendants treated as plaintiffs that the amounts of their respective claims would each have been over the jurisdictional minimum of $3000.00. The record also shows that the defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, were proper, necessary and indispensable parties and that their respective claims were several and not united or common.

Hence, the District Court lacked jurisdiction.

The jurisdiction of the Circuit Court of Appeals is predicated under U. S. Code Annotated, Title 28, Section 225, A and D. The judgment of dismissal of the District Court was a final judgment.

Statement of the Case.

Appellant's statement of the case as contained in pages 3 to 7 of his opening brief is correct save as qualified by the following corrections and additions

The action was filed as a class action in behalf of the various parties (listed as defendants) except as to the defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania. Plaintiff elected to bring this action because of the fact that he was bailee of these other defendants. It is not true that the amount in controversy as to the claim of any one individual defendant member of the class referred to was in excess of $3000.00, although in the complaint it is claimed that the aggregate claims of the various members of the class was in the amount of $6720.00. The asserted claim of each defendant was separate and distinct from the claims of every other defendant. The claim of each defendant was several and as to a particular amount of money and the claim of each defendant did not go to any entire or undivided interest.

The complaint alleged that it was the intention of the plaintiff and the insurance company to cover customers' fur garments in possession of the plaintiff irrespective of whether or not the plaintiff issued a receipt to such customer specifying a declared valuation, but this allegation is denied in the answer of the defendant. The policy attached to the complaint as Exhibit A specifically provides, "2. This company shall not be liable hereunder

for more than the amount stipulated in the assured's receipts as applied to each respective article whether on account of the assured's legal liability or otherwise." The answer further denied the allegation in the complaint that there was any waiver whatsoever in respect to this condition of the policy.

There are no facts alleged in the complaint showing that the defendant insurance company became liable to the plaintiff for the sum of $6720.00. There is a conclusion recited in page 12 of the complaint as follows: "That thirty days after receipt of said proof of loss above set forth, to-wit, on the 22nd day of February, 1940, there became due and payable from said defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, to said plaintiff *and* said defendant owners the sum of $6720.00."

The cause herein was set for trial on April 25, 1941, and prior thereto the plaintiff moved for a continuance, which motion was heard on March 31, 1941. By affidavit in support thereof, executed by plaintiff's counsel, among other things it was alleged that plaintiff filed the action thinking that the defendants named would join in the action to set forth their losses; that plaintiff could not serve said defendants as defendants because to do so would create a lack of diversity of citizenship of parties, thereby defeating the jurisdiction of the District Court; that plaintiff believed that defendants named (customers) would ask leave to intervene as plaintiffs if a continuance were allowed. Further in said affidavit it was shown that

plaintiff had not been able to ascertain any loss or liability and it is to be noted that there is nowhere in the complaint any allegation that the plaintiff has sustained any; further in said affidavit filed by the plaintiff in support of said motion for continuance, it is stated that the continuance should be granted until such time as plaintiff's legal liability can be ascertained or until proper parties intervene. In addition said affidavit recites that plaintiff's attorney (who made the affidavit) was engaged in another trial in the District Court that would last for approximately two months. [See Tr. of Rec. pp. 32 to 36.]

The motion for continuance was granted. Thereafter and not until approximately six months later defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, moved for the dismissal herein, predicated in part upon the affidavit of plaintiff's attorney filed in support of said motion for continuance above referred to. In the meantime, as is apparent from the record, no amended pleadings, no complaint in intervention or no supplemental pleading of any sort had been offered or leave sought for filing thereof. Even after the filing of the motion to dismiss the action, no notice of motion for leave to file amended pleadings or for intervention or for dismissal as to some defendants was given. Not until at the time of the actual hearing of the motion to dismiss did the plaintiff seek to amend, re-align or dismiss, and even then no affidavits or moving papers were submitted in support thereof. The motion made at the

hearing for leave to file amended complaint was merely oral.

As recited by appellant, the motion to dismiss the action was granted and the oral motion for filing amended complaint denied.

Thereafter on November 3, 1941, pursuant to moving papers theretofore served, motion to vacate the order of dismissal and to allow the filing of an amended complaint, dismiss as to defendants except as to defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, or in the alternative to re-align the defendants as parties plaintiff, was made and motion denied. In support of this motion to vacate, an affidavit of plaintiff's attorney was filed in which it was stated among other things that the attorney for plaintiff believed that it was through surprise, mistake and excusable neglect that plaintiff was prevented from furnishing to the court at the time of the hearing of the motion to dismiss, proof that the defendants other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, were not necessary parties to the action and should have been dismissed or re-aligned as parties plaintiff. However, nowhere did plaintiff seek to establish any such surprise, mistake or excusable neglect, nor offer any proof that the defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, were not necessary parties to the action. [See Tr. of Rec. p. 47.]

Not only did the record in connection with the motion to dismiss definitely show that the District Court was

without jurisdiction, but in addition the record failed to show that a re-alignment of the parties plaintiff would have availed anything, as jurisdiction would have been defeated unless it was established that each plaintiffs' claim was in the minimum jurisdictional amount. Moreover, the proposed amendment offered at this late stage sought to change the entire claim upon which the complaint was predicated by changing it from a class action or an action in behalf of the parties primarily interested, to-wit, the named defendants, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania. A dismissal as to the other defendants would have been to the same effect. Hence, it is the appellee's position and it was the position of the court below, that none of the devices that plaintiff sought to apply to defeat the motion for dismissal or to vacate the order of dismissal would or could be of any avail, and that this was purely and simply an instance of the plaintiff mistaking the forum of his action. Obviously and necessarily, the action should not have been filed in the said United States District Court.

ARGUMENT.

I.

The Customers of the Plaintiff Who Sustained Loss, if Any, Were Necessary and Proper Parties Either as Plaintiffs or Defendants.

Appellee does not take issue with the statement of appellant that for the purpose of determining jurisdiction the court can disregard improper or unnecessary parties. However, it is respectfully submitted that the customers who were named as defendants were necessary parties. In the first place it must be recalled that from plaintiff's very complaint it is established that the action was in the nature of a class action brought by the plaintiff for the benefit of those primarily interested, to-wit, the customers. This is set forth in paragraph X of the complaint. Moreover, in paragraph XI it is set forth that the said customers are those that sustained the loss, which was the subject matter of the action herein. [Rep. Tr. p. 8.] Nowhere in the complaint is there any allegation or statement that the plaintiff, the bailee, sustained any loss. *Nowhere is there any allegation in the complaint that the plaintiff was liable for the loss claimed by the customers.* The only interest that could possibly be claimed by plaintiff under any form of action in which he might join against the defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, would have to be predicated upon his "legal liability" for loss or damage to property of his customers. This is the very provision of the policy attached to plaintiff's complaint. [See Tr. of Rec. p. 11.] Hence in the absence of a showing on the part of the plaintiff that he had some sort of legal liability, he could not state a cause of action against the defendant Franklin Fire Insurance Company

of Philadelphia, Pennsylvania. On the other hand, as to the customers, assuming the terms and conditions of the policy had been fulfilled and assuming they suffered loss, then they would have claims under the policy as the policy provided that it covered certain insured property, to-wit, furs or garments trimmed with fur belonging to such customers. Moreover, the policy attached to plaintiff's complaint, and upon which the complaint is predicated, gives an option to the insurance company to pay any loss that might be sustained under the terms of the policy either to the assured or the customer or owner of the property. [See Tr. of Rec. p. 13.] This is an option in favor of the company and any claim that the plaintiff might make in the absence of joinder by the customers would be completely answered by the insurance company electing to exercise their option to adjust with or pay the loss, if any, to the respective customers. Hence it is demonstrated that the customers, the defendants, were not only proper but indispensable parties to the action. It might be added that this is all tacitly admitted by counsel for the plaintiff in the affidavit in support of motion for continuance filed March 26, 1941. (The position is set forth at the bottom of page 33 and page 34 of the transcript of the record herein.)

> Indispensable and necessary parties are "persons who not only have an interest in the controversy but an interest of such a nature that a final decree can not be made without either affecting that interest or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience."
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> *Niles-Bement Pond Co. v. Iron Molders Union Local No. 68,* 254 U. S. 77 at page 80; 65 L. Ed. 145 at page 148, 41 S. Ct. 39.

II.

In Order That the District Court Have Jurisdiction All of the Plaintiffs and All of the Defendants Must Be Residents of Different States. There Must Be a Diversity of Citizenship.

There is no dispute and the plaintiff freely admits that some, if not all of the customers (who were joined as defendants), were residents of the same district in which plaintiff resides. Hence, by the making of these customers defendants, plaintiff created a lack of diversity of citizenship between all of the plaintiffs and all of the defendants and as a result established lack of jurisdiction of the District Court.

U. S. Code, Annotated, Title 28, Section 41, Subdivision 1;

Wylie v. State Board of Equalization of California (D. C. Cal., 1938), 21 Fed. Sup. 604;

Osthaus v. Button (C. C. A. Pa., 1934), 70 Fed. (2d) 392.

omson vs. Goskill case,
lume 62, Number 9,
preme Court Reporter
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III.

Even if There Had Been a Re-alignment So as to Make the Defendants, Other Than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, Plaintiffs Instead of Defendants, the District Court Would Have Lacked Jurisdiction, as Jurisdictional Amount Would Have Been Lacking.

Had these parties defendant, other than the Franklin Fire Insurance Company of Philadelphia, Pennsylvania, been re-aligned and made plaintiffs then there is no allegation and the plaintiff makes no contention that any one of such individuals had a claim against the defendant Franklin Fire Insurance Company of Philadelphia, Pennsylvania, in excess of the jurisdictional requirement of $3000.00 This matter was argued and considered by the District Judge both at the time of the motion to dismiss and at the time of motion to vacate the order of dismissal. This being so, and it being apparent that each plaintiff's claim was individual, separate and distinct the fact that the aggregate of the claims would amount to $6[illegible]0.00 would aid the plaintiff not one whit.

Pinel v. Pinel, 240 U. S. 594;

Hilliker v. Grand Lodge K. P., et al., 112 Fed. (2d) 382 (Sixth Circuit).

In the said case of *Hilliker v. Grand Lodge K. P., supra,* the court states as follows:

> "The only ground of federal jurisdiction alleged is diversity of citizenship. The plaintiff's claim against the bank was $21.45, reduced by the 20 per

cent in dividends prior to the beginning of her suit. Her only interest is to have the balance to her credit paid and in no circumstances may she received more. *It has long been held that creditors who have each a single title or right against a debtor not in excess of $3000 may not aggregate their claims, as plaintiffs, to confer jurisdiction upon a Federal Court.* Title Guaranty Co. v. Allen, 240 U. S. 136, 140, 36 S. Ct. 345, 60 L. Ed. 566; Lion Bonding Co. v. Karatz, 262 U. S. 77, 43 S. Ct. 480, 67 L. Ed. 871; Rogers v. Hennepin County, 239 U. S. 621, 36 S. Ct. 217, 60 L. Ed. 469; Scott v. Frazier, 253 U. S. 243, 40 S. Ct. 503, 64 L. Ed. 883. In cases where the amount in controversy is measured by the value of the property involved in the litigation, Hunt v. New York Cotton Exchange, 205 U. S. 322, 335, 27 S. Ct. 529, 51 L. Ed. 821; Western & Atlantic R. R. Co. v. Railroad Commission of Georgia, 261 U. S. 264, 43 S. Ct. 252, 67 L. Ed. 645, or where the several plaintiffs have a common undivided interest in a single title or right, Troy Bank v. G. A. Whitehead & Co., 222 U. S. 39, 41, 32 S. Ct. 9, 56 L. Ed. 81, it may be enough, to confer jurisdiction, that the interests of the plaintiffs collectively equal the jurisdictional amount. *The fact that the appellant alleged that she sued on behalf of others similarly situated, does not help her.* Title Guaranty Co. v. Allen, *supra;* Eberhard v. N. W. Mutual Life Ins. Co., 6 Cir., 241 F. 353, 356; Wales v. Jacobs, 6 Cir., 104 F. 2d 264. *The appellant asserts no common and undivided right in herself jointly with others in any fund or property, and the amount owing to her or to each of the others of the class depends upon each individual contract alone.* No relief is sought for group rights under a single decree, Beatty v. Kurtz, 2 Pet. 566, 7 L. Ed. 521, or rights which no single plaintiff can enforce in the

absence of the others because derived from a single security instrument. Troy Bank v. Whitehead & Co., *supra. The contention that the funds sought to be recovered will constitute a trust fund for the benefit of all creditors of the bank, does not permit aggregation.* As pointed out in Wales v. Jacobs, *supra,* the assets of a corporation always constitute a trust fund for the benefit of its creditors, but appellant's claim to an aliquot interest therein is still single. * * * *A general allegation that the amount in controversy exceeds $3,000 is of no avail where the bill, as here, discloses that it must rest on aggregating individual claims for less.* Vance v. Vandercook Co., 170 U. S. 468, 18 S. Ct. 645, 42 L. Ed. 1111." (Italics ours.)

In the case of *Pinel v. Pinel, supra,* the court stated as follows:

"The settled rule is that when two or more plaintiffs having separate and distinct demands unite in a single suit it is essential that the demand of each be of the requisite jurisdictional amount, but when several plaintiffs unite to enforce a single title or right in which they have a common and undivided interest, it is enough if their interests collectively equal the jurisdictional amount. Clay v. Field, 138 U. S. 464-479; Troy Bank v. Whitehead, 222 U. S. 39. This case comes within the former class since the title of each complainant is separate and distinct from that of the other. It being evident that the testator's omission to provide for one of the children by will, * * * is independent of the question whether a like mistake was made with respect to another child."

Conclusion.

It is respectfully submitted that the trial court properly held that it had no jurisdiction and properly dismissed the action herein and refused to vacate its order of dismissal. Not only would an amendment or re-alignment or dismissal as to certain defendants have availed the plaintiff nothing, but the District Court most certainly did not abuse its discretion in refusing to allow the same. The judgment of the District Court should be affirmed.

Respectfully submitted,

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Attorney for Appellee.